MEMORANDUM ENDORSED

THE CITY OF NEW YORK
LAW DEPARTMENT
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August 13, 2008

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 8/14/08

BY FAX: 212-805-4268
Honorable Gabriel W. Gorenstein
United States Magistrate Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: Paul Selinger et al. v. City of New York, et al., 08 CV 2096 (RMB)

Your Honor:

I am the Assistant Corporation Counsel handling the defense of this action on behalf of defendant City of New York. In accordance with the Court's Order of August 14, 2008, I write in response to plaintiffs' letter dated August 7, 2008[1], in which plaintiffs seek permission to file a second amended complaint. For the reasons outlined below, defendant does not oppose plaintiffs' request to file a second amended complaint, except to the degree plaintiffs intend to bring false arrest claims against individual defendants, which are time-barred by the applicable three-year statute of limitations.

In the August 7, 2008, letter, plaintiffs allege that the City failed to provide the names of the officers involved in plaintiffs' investigation and arrest and therefore plaintiffs were unable to amend their complaint. This matter was discussed at the July 17, 2008, conference before Judge Berman. At that conference, defendant informed the Court that the arresting officer, Detective William Greene, was retired and that the defendant had reached out to him to see if he would accept service at One Police Plaza. As defendant had not spoken to the arresting officer, it was unaware of any other involved officers at that time.

Plaintiffs did not confer with defendant's counsel at any time after the July 17, 2008, conference prior to filing their August 7, 2008, letter. However, on August 5, 2008, defendant's counsel spoke with Detective William Greene, and identified an undercover officer – UC 5604— and a Lieutenant Angelo Carbone (retired), who were also involved in the investigation of plaintiff Paul Selinger. Their names were provided to plaintiffs' counsel on August 6, 2008.

[1] Although the letter is dated August 7, 2008, defendants note that the letter was filed on August 5, 2008.

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Defendant has reached to these officers to see if they wish to be represented by this office and whether they will consent to service at One Police Plaza. Once they respond, defendant will inform plaintiffs that all individual defendants may be served. Therefore, defendant City submits that the issue raised in plaintiffs' August 7, 2008, letter are effectively moot.

Defendant City will consent to plaintiffs filing a second amended complaint, as long as the claims pled are within the applicable statute of limitations. As briefed fully in defendant's pre-motion conference letter to Judge Berman, plaintiff Paul Selinger's false arrest claims against the individual officers are barred by the statute of limitations. Plaintiff was arrested on March 22, 2005, and therefore any false arrest claim is barred. Plaintiffs cannot amend the complaint to replace the John Does with actual persons. The Second Circuit has held that "Rule 15(c) explicitly allows the relation back of an amendment due to a 'mistake' concerning the identity of the parties (under certain circumstances), but the failure to identify individual defendants when the plaintiff knows that such defendants must be named *cannot* be characterized as *mistake*." *Barrow v. Wethersfield Police Dep't*, 66 F.3d 466, 468-469 (2nd Cir. 1995), modified 74 F.3d 1366 (2nd Cir. 1996). (emphasis added); *see also Malesko v. Correctional Services Corp.*, 229 F3d 374, 382-84 (2nd Cir. 2000), *rev'd on other grounds*, 534 U.S. 61 (2001) (plaintiff's amendment to substitute named individuals in place of "Doe" defendants after the statute of limitations expired does *not* "relate back" and is *untimely* under FRCP 15(c) because plaintiff's addition of newly-named defendants served solely to correct plaintiff's lack of knowledge of the identities of the individual defendants.)

In its consideration of whether "justice so requires" permitting leave to amend a complaint under Rule 15, the Court examines whether the amendment (1) has been delayed unduly; (2) is sought for dilatory purposes or is made in bad faith, (3) the opposing party would be prejudiced, or (4) would be futile. *See Forman v. Davis*, 371 U.S. 178, 182 (1962); *Lee v. Regal Cruises, Ltd.*, 916 F. Supp 300, 303 (S.D.N.Y. 1996, aff'd 116 F.3d 465 (2d Cir. 1997). A proposed amendment is futile when it fails to state a claim. *Health-Chem Corp., v. Baker*, 915 F.2d 805, 810 (2d. Cir. 1990)("Although Fed. R. Civ. P. 15(a) provides that leave to amend should be given freely when justice so requires, where, as here, there is no merit in the proposed amendments, leave to amend should be denied.") *Mina Inv. Holdings Ltd., v. Lefkowitz*, 184 F.R.D. 245, 257 (S.D.N.Y. 1999). Futility exists, for example, where the claims plaintiff seeks to add are barred by the statute of limitations or are unlikely to be productive. *Grace v. Rosenstock*, 228 F.3d 40, 53 (2d Cir.2000) "The proposed Amended Complaint may therefore be scrutinized as if defendant's objections to the amendments constitute a motion to dismiss under Fed. R. Civ. P. Rule 12(b)(6). *Journal Publ'g Co. v. American Home Assur Co.*, 771 F. Supp. 632, 635 (S.D.N.Y. 1991). Any attempt by plaintiffs to plead time-barred false arrest claims against actual persons would not survive a motion to dismiss under 12(b)(6) and therefore their request to amend should be denied as futile.

For these reasons, defendant submits that it has already provided the names of the officers to plaintiffs and defendant will, without waiving any applicable defenses, consent to plaintiffs' submission of a second amended complaint as long as it does not include time-barred false arrest claims. Therefore, defendant submits that a conference concerning these issues is not required. However, should the Court decide to proceed with a conference, defendant requests that the conference be scheduled after August 27, 2008, as I am currently out of the office and will be so until that date.

Thank you for your consideration of this request.

Respectfully submitted,

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Inasmuch as (1) leave to amend the complaint was already granted for the purpose of adding additional defendants, and (2) denial of leave to file an amended complaint on futility grounds (the only objection raised) is a matter of "discretion," Grace v. Rosenstock, 228 F.3d 40, 53 (2d Cir. 2000), the simplest course of action is to permit filing of a second amended complaint without prejudice to a motion to dismiss by any party on statute of limitations or any other grounds. The second amended complaint shall be filed on or before August 25, 2008.

SO ORDERED: DATE: 8/14/08

GABRIEL W. GORENSTEIN
UNITED STATES MAGISTRATE JUDGE